over lesser offenses. If so, there is no reason to increase the present number of devices affording flexibility, and invade, in so doing, the province of the prosecuting attorney in whom normally the discretion lies.

WAIVER OF THE PRIVILEGE FROM COMMENT ON FAILURE TO TESTIFY. — By almost universal legislation in the United States the accused is protected from any inference from his failure to take the stand.[1] This privilege is held to extend to preliminary proceedings such as an application for bail,[2] a hearing on *habeas corpus*,[3] or the preliminary examination before a justice of the peace,[4] as well as to the trial before a jury. It is also regarded as extending throughout the prosecution, the failure of the accused to testify at an earlier proceeding not being subject to comment in the later proceeding when he elects to remain silent in the latter.[5] But when the accused takes the stand in the later proceeding the question at once arises whether he has not thereby waived his privilege. In the majority of jurisdictions the accused is held to have waived his privilege against self-crimination to the extent of being subject to answer all questions relevant to the issue,[6] or to suffer unfavorable comment upon his failure so to answer.[7] But does it follow that he should be held to have waived his privilege from comment on his failure to take the stand in some earlier proceeding? The legislature by the prohibition of comment upon silence is adopting the policy that the failure of a defendant to testify is to have no significance, the elimination of comment being necessary to make such a policy effective, as emphasis of the silence of the accused before the jury would naturally lead the jury to attach significance to such silence.[8] The purpose of the adoption of such a policy is to avoid placing any pressure upon the defendant to take the stand.[9] In spite of the recent tendency of opinion in favor of compelling the defendant to testify in his own

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[1] For the phrasing of the various enactments, see 1 WIGMORE, EVIDENCE § 488. For cases construing these statutes, see 3 ANN. CAS. 164, note; 20 ANN. CAS. 1273, note; ANN. CAS. 1917, D. 278.

[2] Newman *v.* Commonwealth, 28 Ky. Law. 81, 88 S. W. 1089 (1905).

[3] Swilley *v.* State, 73 Tex. Cr. Rep. 619, 166 S. W. 733 (1914).

[4] Bunckley *v.* State, 77 Miss. 540, 27 So. 638 (1900).

[5] Templeton *v.* People, 27 Mich. 501 (1873); Parrott *v.* Commonwealth, 47 S. W. 452 (Ky., 1898).

[6] People *v.* Johnston, 228 N. Y. 332, 127 N. E. 186 (1920); Carpenter *v.* State, 193 Ala. 51, 69 So. 531 (1915). Commonwealth *v.* Nichols, 114 Mass. 285 (1873).

[7] Caminetti *v.* United States, 242 U. S. 470 (1917); State *v.* Larkin, 250 Mo. 218, 157 S. W. 600 (1913); State *v.* Ober, 52 N. H. 459 (1873). See 4 WIGMORE, EVIDENCE, § 2276, for a discussion of the extent of the waiver in jurisdictions taking a different view.

[8] Some statutes not only prohibit comment but require the court to caution the jury against drawing any inference from the defendant's silence. See WHARTON, CRIMINAL EVIDENCE, 10 ed., § 435, where this procedure apart from statute is supported.

[9] For a discussion of the purpose of the privilege, see Wilson *v.* United States, 149 U. S. 60, 66 (1893). See also 4 WIGMORE, EVIDENCE, § 2272.

behalf [10] the judiciary is hardly in a position to bring this about. To attempt to do so by limiting the scope of the legislative prohibition of comment on silence so as not to apply where the defendant has taken the stand in a later proceeding is not consistent with the prohibition. If no significance is to attach to silence during one phase of the trial, it seems difficult to justify attaching significance to it in some later phase. The defendant having made what the legislature has seen fit to consider a meaningless election, a meaning can not very well be given to it by some later act of the defendant.

Although the same reasoning applies where there is a statutory provision that no reference is to be made to the failure of the accused to testify, a recent decision,[11] once the defendant took the stand, permitted the prosecution over objection to question him in regard to his previous silence. The upper court affirmed this procedure on the ground that by taking the stand the defendant waived the benefit of the statute prohibiting such reference to his silence. The court considered that the defendant had elected to put himself in a position where the statute did not apply, arguing that it was not intended to apply in such a case because the purpose for which it was enacted is non-existent in a situation where the defendant has taken the stand. The court recognized as the purpose of the statute the prevention of an inference of guilt from the defendant's failure to testify, but considered that any such inference was dispelled by his taking the stand, so that the fact of previous silence would be of no consequence. The court appears to have overlooked the fact that the jury is still likely to attach significance to the defendant's previous silence, even though the defendant has the opportunity to explain it away. The result of such a decision is to place pressure upon a defendant to take the stand from the beginning, and to place considerable pressure on a defendant who has once remained silent so to continue. In both situations it removes that freedom of election which the state legislatures aimed to secure in passing these statutes. Some support for the view advanced in *People* v. *Prevost* is found in *Commonwealth* v. *Smith* [12] and in *Taylor* v. *Commonwealth*,[13] the latter being relied upon in the opinion. But the Kentucky court has since changed its attitude [14] and the Massachusetts decision does not give any convincing reasons for the result therein reached. There are numerous decisions to the contrary [15] and in the same jurisdiction

[10] See Walter T. Dunmore, "Comment on Failure of Accused to Testify," 26 YALE L. J. 464; Henry T. Terry, "Constitutional Provisions against Forcing Self-Incrimination," 15 YALE L. J. 127; Ernest Bruncken, "Making the Accused Testify Against Himself," 5 MARQUETTE L. REV. 82.

[11] People *v.* Prevost, 189 N. W. 92 (Mich. 1922). For the facts of this case see RECENT CASES, *infra*, p. 219.

[12] 163 Mass. 411, 40 N. E. 189 (1895).

[13] 17 Ky. Law, 1214, 34 S. W. 227 (1896).

[14] Newman *v.* Commonwealth, *supra*; Parrott *v.* Commonwealth, 47 S. W. 452 (Ky. 1898).

[15] Smith *v.* State, 90 Miss. 111, 43 So. 465 (1907); Hare *v.* State, 56 Tex. Cr. 6, 118 S. W. 544 (1909); Newman *v.* Commonwealth, *supra.*; State *v.* Bailey, 54 Ia. 414, 6 N. W. 589 (1880); Rex *v.* Mah Hong Hing, 3 W. W. R. 314 (B.C.C.A., 1920). *Cf.* Myrick *v.* United States, 219 Fed. 1 (1st Circ., 1915).

in an earlier decision [16] the court, in holding it error to let in evidence that the accused made no defense on his preliminary examination, adopted what is submitted to be the view more consonant with the purpose of these statutes.

THE STATUS OF A CROPPER. — A decision [1] involving the California Land Law [2] raises the much vexed problem of the cropper. When there is an agreement by the owner of land with a laborer, by which the latter is to work the land for a specified portion of the crop, the parties are generally held to stand to each other in any of three [3] relations: (1) owner and cropper, (2) landlord and tenant, (3) tenants in common of the crop.

The intention of the parties determines the status created by their agreement.[4] In the absence of an expressed intent courts are aided by various considerations of fact.[5] If the laborer enters upon the land merely to cultivate it, and lives elsewhere, he is obviously a cropper.[6] If he lives on the land in exclusive possession,[7] or if the agreement of the parties contains such words as, "rent," "lease," "demise," etc.,[8] although neither of these tests is conclusive,[9] most courts regard him as a tenant. Where each supplies part of the agricultural material, and the cultivator lives on the land, they are usually held to be tenants in common of the crop, whatever may be their relation as to the land.[10] Ever since an Elizabethan case,[11] the time for which the contract is to continue has also been an important factor, the tendency being to construe the agreement to be a lease if it calls for more than a year's work.[12] To protect the owner's in-

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[16] Templeton *v.* People, *supra.*

[1] O'Brien *v.* Webb, 279 Fed. 117 (N. D. Cal., 1922). For the facts of this case see RECENT CASES, *infra*, p. 225.

[2] See 1921 CAL. STAT. 83.

[3] The courts have consistently refused to construe these agreements as partnerships. Gardenshire *v.* Smith, 39 Ark. 280 (1882); Romero *v.* Dalton, 2 Ariz. 210 (1886). See PARSONS, PARTNERSHIP, 4 ed., § 61, note. See 1905 N. C. CODE REV., § 1982.

[4] Alwood *v.* Ruckman, 221 Ill. 200 (1858); Orcutt *v.* Moore, 134 Mass. 48 (1883); Birmingham *v.* Rogers, 46 Ark. 254 (1885).

[5] If the contract is oral, the intent is to be determined by the jury. Williams *v.* Cleaver, 4 Houst. (Del.) 453 (1855); Warner *v.* Abbey, 112 Mass. 355 (1873). If written, by the court. Orcutt *v.* Moore, *supra*; Reed *v.* McRill, 41 Neb. 206, 57 N. W. 775 (1894).

[6] Warner *v.* Hoisington, 42 Vt. 94 (1869).

[7] Dixon *v.* Niccoll, 39 Ill. 372 (1866); Steel *v.* Frick, 56 Pa. St. 172 (1867); Cornell *v.* Dean, 105 Mass. 435 (1870); Rowlands *v.* Voechting, 115 Wis. 352, 91 N. W. 990 (1902).

[8] Clarke *v.* Cobb, 121 Cal. 595, 54 Pac. 74 (1898); Mundy *v.* Warner, 61 N. J. L. 395, 39 Atl. 697 (1898).

[9] As to possession see Strain *v.* Gardner, 61 Wis. 174, 21 N. W. 35 (1885); Reeves *v.* Hannan, 65 N. J. L. 249, 48 Atl. 1018 (1900). As to wording see Griswold *v.* Cook, 46 Conn. 198 (1878); Harrison *v.* Ricks, 71 N. C. 7 (1874).

[10] Putnam *v.* Wise, 1 Hill (N. Y.), 234 (1841); Guest *v.* Opdyke, 31 N. J. L. 552 (1864); Schlict *v.* Callicott, 76 Miss. 487, 24 So. 869 (1898).

[11] Hare *v.* Celey, Cro. Eliz. 143.

[12] Herskell *v.* Bushnell, 37 Conn. 36 (1871); Harris *v.* Frink, 49 N. Y. 24